Supreme Court, U.S.
FILED
APR 23 1998
OFFICE OF THE CLERK

No. 97-1573

In The
Supreme Court Of The United States
October Term, 1997

IN RE: ELISABETH H.

IN RE: CATHERINE H.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD BLUMENTHAL
ATTORNEY GENERAL
OF CONNECTICUT

SUSAN T. PEARLMAN*
Assistant Attorney General
Office of the Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
(860) 808-5480
ct06338

Counsel of Record

service by
BRESCIA'S
PRINTING SERVICES, INC.
CALL 800.842.0008

QUESTIONS PRESENTED

1. Was the Connecticut Appellate Court correct in dismissing the appeal on the ground of mootness, due to the fact that the children who were the subject of the juvenile court proceeding had reached the age of majority?

2. Did dismissal of the appeal based on mootness under state law in any way violate the Petitioners' Constitutional rights?

TABLE OF CONTENTS

JURISDICTION 1

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. THE CONNECTICUT APPELLATE COURT WAS CORRECT IN ITS DECISION THAT THE APPEAL WAS MOOT AND THE ISSUE OF MOOTNESS IS AN ISSUE OF STATE LAW ENABLING A STATE APPELLATE COURT TO INTERPRET THE PARAMETERS OF ITS JURISDICTION 6

II. THE SIXTH AMENDMENT RIGHT TO COUNSEL DOES NOT APPLY TO PROCEEDINGS UNDER NEGLECT PETITIONS WHICH ARE CIVIL IN NATURE. THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS NOT PRESERVED FOR APPEAL 10

III. THE EVIDENCE DID NOT ESTABLISH ANY NEXUS BETWEEN A REQUIRED RELIGIOUS PRACTICE AND THE ALLEGATIONS OF NEGLECT AND ABUSE 14

IV. THE PETITION FOR WRIT OF CERTIORARI DOES NOT MEET THE CRITERIA SET FORTH IN RULE 10 .. 16

CONCLUSION 17

INDEX TO APPENDICES

APPENDIX A -

In re Catherine and Elisabeth H., Superior Court Memorandum of Decision, November 7,1995.

APPENDIX B -

Connecticut General Statutes § 1-1d
Connecticut General Statutes § 17a-101g

TABLE OF AUTHORITIES

Cases:

Adler v. Board of Education, 342 U.S. 485, 496 (1952) 1,6n.7

Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931) 1

Aksomitas v. Aksomitas, 205 Conn. 93, 97; 529 A.2d 1314 (1987) 14

Citicorp Mortgage, Inc. v. Hairston, 34 Conn. App. 138, 138-39, 640 A.2d 146 (1994) 7

Clement v. Clement, 34 Conn. App. 641, 643 A.2d 874 (1994) 7

Enterprise Irrigation District v. Canal Co., 243 U.S. 157, 164 (1917) 1

Faretta v. California , 422 U.S. 806, 836 (1975) 12,13n.15

First Trust National Ass'n v. Hitt, 36 Conn. App. 171, 174, 649 A.2d 798 (1994) 6

Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) 1

Housing Authority v. Lamothe, 225 Conn. 757, 627 A.2d 367 (1993) 7

In Re Bobby Jo S, 10 Conn. App. 36, 40, 521 A.2d 219 (1987) 11n.13

In Re Felicia S. and Janelle D., 1993 WL 576430 (Conn. Super.). 11n.13

In Re Romance M., 229 Conn. 345, 641 A.2d 378 (1994) 7

Klinger v. Missouri, 13 Wall 257, 263 (1871) 1

Lassiter v. Department of Social Services, 452 U.S. 18, 27, 101 S. Ct. 2153, 2162 (1981) 11,13n.14

Lavertue v. Niman, 196 Conn. 403, 493 A.2d 213 (1985) 11n.13

Loisel v. Rowe, 233 Conn. 370, 378, 670 A.2d 323 (1995) 6

Mason v. Gen. Brown Cent. School District, 851 F.2d 47, 51 (2d. Cir. 1988) 14

Matthews v. Eldrige , 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1986) 12n.14,12n.15

McDuffee v. McDuffee 39 Conn. App. 412, 664 A.2d 1164 (1995) 7

Prince v. Massachusetts, 321 U.S. 158 (1944) 16

Sadlowski v. Manchester, 206 Conn. 579, 583, 538 A.2d 1052 (1988) 6

Sgarellino v. Hightower, 13 Conn. App. 591, 538 A.2d 1065 (1988) 8

State v. Anonymous, 179 Conn. 155, 159, 425 A.2d 939 (1979) 10

State v. Day., 233 Conn. 813, 830, 661 A.2d 539 (1995) 12,13n.15

State v. Gethers, 197 Conn. 369, 379, 497 A.2d 408 (1985) 13n.15

State v. Goffe, 41 Conn. App. 454, 474, 676 A.2d 1377, 1386 (1996) 11

State v. Townsend, 211 Conn. 215, 222, 558 A.2d 669(1989) 13n.15

Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) 14

Statutes:

Conn. Gen. Stat. § 1-1d 7

Conn. Gen. Stat. § 17a-10 ..... 11n.13

Conn. Gen. Stat. § 17a- 101g(c) 2n.1,8n.11,9

Conn. Gen. Stat. § 17b-745 ..... 11n.13

Conn. Gen. Stat. § 46b-120 ..... 3n.2,4,7,9n.11 11n.13

Conn. Gen. Stat. § 46b-121 ..... 10n.12

Conn. Gen. Stat. § 46b-129(a) 3n.2,9n.11

Conn. Gen. Stat. § 46b-129(b) 2n.1,8n.11,9

Conn. Gen. Stat. § 46b-129(d) 9n.11

Conn. Gen. Stat. § 46b-135 ..... 13n.16

Conn. Gen. Stat. § 46b-136 ..... 13n.16

28 U.S.C. § 1257(a) 1

Rules and Regulations:

Connecticut Practice Book § 1048.1 (now Practice Book § 34-1(1998 rev.) 13n.16

Connecticut Practice Book § 4061 (now Practice Book 60-5(1998 rev.) 14

DCF Reg. § 17a-145-101(o) 5n.6.8n.10

DCF Reg. § 17a-145-152 (effective February 20, 1997) 8n.10

Supreme Court Rule 10 16

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

IN RE: ELISABETH H.
IN RE: CATHERINE H.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
CONNECTICUT

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

JURISDICTION

The Petitioners cite 28 U.S.C. § 1257(a) to invoke the jurisdiction of this court. Neither the decision of the Connecticut Appellate Court, see Appendix B of the Petition, nor the decision of the Connecticut Supreme Court, see Appendix A of the Petition, addressed the validity of a treaty or statute of the United States, or addressed the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, or addressed any title, right, privilege, or immunity specially set up or claimed under the constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The United States Supreme Court has no jurisdiction over this case in that the sole issue decided by the Connecticut Appellate Court, and which the Connecticut Supreme Court declined to review, is a matter of state law, mootness of the proceedings below. The United States Supreme Court will not pass on the constitutionality of a state statute or regulation before state courts have had an opportunity to do so. Adler v. Board of Education, 342 U.S. 485, 496 (1952). When the state court decision rests on an independent and adequate state ground, the United States Supreme Court is without jurisdiction to review the decision. Enterprise Irrigation District v. Canal Co., 243 U.S. 157, 164 (1917); Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931); Klinger v. Missouri, 13 Wall 257, 263 (1871); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

COUNTERSTATEMENT OF THE CASE

On September 8, 1993, Elisabeth H. and Catherine H. were removed from their parents' home by the Danbury police in

response to a call from Barbara C., their half-sister. Barbara C. reported that Catherine C. was incoherent, that she had been threatened by her mother and that Elisabeth was distraught and at risk of injuring herself. Tr. 12/6/93 at 101; States Ex. E; Respondents' Ex. 2; Tr. 2/9/94 at 123-24. Barbara C. also called the careline of the Connecticut Department of Children and Families ("DCF"). At the time of their removal, the young adults Catherine H. (d.o.b. 11/10/77) and Elisabeth H. (d.o.b. 3/23/79) were fifteen and fourteen years of age respectively. On September 8 and 9, 1993 the young adults reported abusive treatment in the home and were interviewed by a psychiatrist, a psychiatric nurse and a DCF social worker. These professionals reported that the young adults gave reports of abusive treatment in the home and were fearful of returning home and at risk of running away if forced to return. Tr. 12/6/93 at 100-104. Both young adults reported depression and Catherine reported suicidal ideations Tr. 12/6/93 at 75-76.

On September 9, 1993 the Petitioner Parents signed a thirty day voluntary placement agreement with DCF. On October 1, 1993 the Petitioner Parents refused to extend the voluntary placement agreement, although the young adults were still fearful of returning home and stated they would run away if forced to return. Tr. 12/13/93 at 114-116. DCF filed an application for an order of temporary custody (OTC)[1]

---

[1] The OTC was filed pursuant to Conn. Gen. Stat. § 46b-129(b) which provides that an OTC may be granted when "there is reasonable cause to find that the child's condition or the circumstances surrounding his care require that his custody be immediately assumed to safeguard his welfare." Conn. Gen. Stat. § 17a- 101g(c) similarly provides that DCF may remove a child if there is "probable cause to believe that the child is suffering from serious physical illness or is in immediate physical danger from his surroundings and that immediate removal from his surroundings is necessary to insure the child's safety."

and neglect/ uncared for petitions[2] with the Superior Court for Juvenile Matters in Danbury on October 5, 1993. Trial on both the OTC and neglect/uncared for petitions was commenced on December 6, 1993. The OTC was sustained by the trial court on July 14, 1994 and a subsequent motion dated September 12, 1994 to vacate the OTC was denied.

On December 20, 1994, seven months after completion of the state's case and after the court had heard evidence during twenty different trial dates, the Petitioner-Parents' trial counsel, Attorney Ronan, moved to withdraw. Tr. 12/20/94 at 4-9. The Petitioner-Parents then discharged their privately retained counsel after the proceedings on December 20, 1994.[3] The court fully canvassed the parents as to their intent to discharge counsel and to proceed pro se. Tr. 12/27/94 at 18-22. The Court denied the motion to withdraw because of the risk of further delay, risk of mistrial and the inability of new counsel to enter the proceedings at such a late stage. Tr. 12/27/94 at 32-35, 56-57, 60-63.

Attorney Ronan filed a second motion to withdraw on March 1, 1995. The parents filed pro se appearances in lieu of Attorney Ronan. Tr. 3/1/95 at 34-35. Because the parents asserted they could not pay fees owed to Attorney Ronan, DCF raised the option of the parents applying for court appointed counsel and Attorney Ronan being so appointed.

---

[2] Pursuant to Conn. Gen. Stat. § 46b-129(a) and Conn. Gen. Stat. § 46b-120.

---

[3] Attorney Ronan stated " ...they have discharged me ...and I have no attorney client relationship with them at this point...Mr. and Mrs. H. are prepared to continue their case pro se. I have had detailed discussions with them regarding ...the risks of...doing so and I am of the opinion that they have a superior command of the facts, that they can be objective and that they...have been and would continue to read up...up on law and procedure in order to protect their rights." Tr. 12/27/94 at 6.

The parents refused this option. Tr. 3/1/95 at 6, 21. The Court accepted the pro se appearances in addition to Attorney Ronan's appearance and again denied the motion to withdraw. Tr. 3/1/95 at 34.[4] On March 14, 1995, Attorney Ronan filed a third motion to withdraw. The Court again canvassed the parents and they again remained firm in their decision to discharge Attorney Ronan and to proceed pro se.[5] Tr. 3/14/95 at 16-17. The Court, once again, denied the third motion to withdraw. Attorney Ronan appealed from the trial court's March 14, 1995 decision and that appeal was dismissed by the Appellate Court. Attorney Ronan never attended the proceedings after March 14, 1995. The record indicates that despite the trial court's reluctance to release Attorney Ronan from his appearance, Mr. and Mrs. H. repeatedly insisted on representing themselves, understood the ramifications of that decision and had the ability to represent themselves. Tr. 12/27/94 at 12, 18-22; Tr. 3/14/95 at 17-18.

The trial court adjudicated Catherine H. and Elisabeth H. neglected, abused and uncared for within the meaning of Conn. Gen. Stat. § 46b-120 and on November 7, 1995

---

[4] The parents refused to cooperate any longer with Attorney Ronan. Tr. 12/27/94 at 62.

---

[5] Parents' trial counsel stated "...I have kept a dialogue going with Mr. and Mrs. H. ....they are ready, as they were in December, to represent themselves. They have a financial need to do that and they have, I believe the capacity to do so." Tr. 3/14/95 at 16-17. The canvass of the court included the following: "Ms. H.: We stand prepared, your honor to defend ourselves and present testimony and witnesses. The court: And you've taken into consideration all of the consequences and the fact that you'll be held to the same standards as any pro se natural party who acts as their own attorney, the same standards of any attorney at law? You understand that ? Mrs. H.: Yes, we do, your honor. Mr. H.: Yes, we do, your honor." Tr. 3/14/95 at 17-18.

committed Elisabeth H. and Catherine H. to the care and custody of DCF for a period not to exceed twelve months. On November 16, 1995, the Petitioner Parents filed an appeal with the Connecticut Appellate Court.

On December 1, 1995, DCF filed a motion to dismiss for lack of subject matter jurisdiction due to mootness. The motion to dismiss was denied on January 10, 1996.

By letter dated March 11, 1997, the Appellate Court directed the parties to be prepared to address the additional issue of whether the appeal is moot. On March 17, 1997, the date of oral argument, Catherine H. was nineteen years of age and Elisabeth H. was six days from her eighteenth birthday. The Respondent DCF argued that there was no effective relief that could be granted and that there were no collateral consequences. On June 24, 1997, the Connecticut Appellate Court dismissed the appeal as moot. The Petitioner parents filed for certification to appeal with the Connecticut Supreme Court on July 7, 1997.[6] The Connecticut Supreme Court denied the petition for certiorari on September 18, 1997.

---

[6] The Petitioners framed two issues in their petition for certification with the Connecticut Supreme Court. "A. Whether the Appellate Court improperly dismissed the appeal as moot concluding that there were no collateral consequences and that it did not satisfy the capable of repetition yet evading review doctrine . B. Whether the Appellate Court's interpretation of Section 17a-145-101(o) of the Regulations of Connecticut State Agencies was unconstitutional." Therefore, the issues concerning ineffective assistance of counsel and first amendment free exercise were not presented to the Connecticut Supreme Court.

REASONS FOR DENYING THE WRIT[7]

I. THE CONNECTICUT APPELLATE COURT WAS CORRECT IN ITS DECISION THAT THE APPEAL WAS MOOT AND THE ISSUE OF MOOTNESS IS AN ISSUE OF STATE LAW ENABLING A STATE APPELLATE COURT TO INTERPRET THE PARAMETERS OF ITS JURISDICTION

The issue of mootness is an issue that is directly related to a court's monitoring of its jurisdiction. Loisel v. Rowe, 233 Conn. 370, 378, 670 A.2d 323 (1995); First Trust National Ass'n v. Hitt, 36 Conn. App. 171, 174, 649 A.2d 798 (1994). "Mootness implicates the subject matter jurisdiction of this court." Sadlowski v. Manchester, 206 Conn. 579, 583, 538 A.2d 1052 (1988). The United States Supreme Court should not readily interfere with a state court's interpretation of its own jurisdiction. Indeed, in citing only Connecticut case law on the question of mootness in its petition for writ of certiorari, the Petitioners concede that the issue of mootness is a matter of state law. Connecticut case law has held that where no practical relief can

---

[7] The sole issue treated by the Connecticut Appellate Court decision was whether the appeal was moot. Petition Appendix B. The issues as to the sixth amendment right to counsel and the first amendment right to free exercise of religion were not addressed by the Connecticut Appellate Court decision which is the subject of this petition. These issues were also not raised in the application for certification to the Connecticut Supreme Court. The issues concerning the right to counsel and the first amendment right to freedom of religion are not appropriately reviewable pursuant to this petition for certiorari. Adler v. Board of Education, 342 U.S. 485, 496 (1952).

be granted on appeal, the appeal must be dismissed. In Re Romance M., 229 Conn. 345, 641 A.2d 378 (1994); McDuffee v. McDuffee 39 Conn. App. 412, 664 A.2d 1164 (1995); Clement v. Clement, 34 Conn. App. 641, 643 A.2d 874 (1994). The test for determining mootness is not "[w]hether the [Petitioners] would ultimately be granted relief ....The test, instead, is whether there is any practical relief this court can grant the appellant." Citicorp Mortgage, Inc. v. Hairston, 34 Conn. App. 138, 138-39, 640 A.2d 146 (1994).[8]

In their Connecticut Appellate Court brief the Petitioners requested reversal of the trial court decision, and remand for a new trial. Petitioners' Appellate Brief p. 34. In matters concerning child welfare in Connecticut, jurisdiction resides in the juvenile court but only insofar as the matter involves "children" or "youths" as defined in Conn. Gen. Stat. § 46b-120.[9] By the time of the Connecticut Appellate decision, both young adults had reached the age of majority. Conn. Gen. Stat. § 1-1d. If remanded the trial court would have had no authority to enter further orders with respect to the young adults.

The Connecticut Supreme Court has held that it is sufficient to defeat mootness that potential collateral consequences from the trial court decision exist. Housing Authority v. Lamothe, 225 Conn. 757, 627 A.2d 367

---

[8] "Practical" is defined in Webster's II New Riverside Dictionary (1984) as 1. serving a purpose: useful. 2. resulting from or involving experience, practice or use rather than theory or speculation. 3. a. Inclined to action :unspeculative. b. down to earth: sensible. 4. Being so in effect: virtual. (emphasis added).

[9] "Child" is defined as any person under sixteen years of age. "Youth" is defined as any person sixteen to eighteen years of age. Conn. Gen. Stat. § 46b-120.

(1993); Sgarellino v. Hightower, 13 Conn. App. 591, 538 A.2d 1065 (1988). However in each of the cases cited by Petitioner parents, unlike the instant case, there existed real, tangible potential legal consequences to the lower court decision. In the instant petition for writ of certiorari, the Petitioner parents assert only one alleged collateral consequence of the trial court decision that, due to the adjudication of neglect and commitment of the young adults to DCF, they are precluded from becoming foster parents under DCF regulations.[10] The Petitioners failed to establish that there existed any meaningful intent or possibility that they would ever apply to become foster parents. It may be that it is not necessary for the collateral legal consequences to exist or to even be imminent in order to defeat mootness, but the collateral legal consequences must at least be potential, practical and rise above the level of mere fiction.

Petitioners argue that they are not precluded under the DCF regulations from being foster parents until there is a dispositional order of commitment.[11] The clear wording of

---

[10] "No license shall be granted if, within five years of the date of application for license, the provider of anyone regularly residing in the home or any substitute caregiver ...has had a child removed from his care or custody for reasons of child abuse or neglect." DCF Reg. § 17a-145-101(o). Just prior to oral argument this regulation was amended to read that the granting of a license or approval shall be denied "if any member of the household of a foster family or prospective family....has had a minor removed from their care because of child abuse or neglect." DCF Reg. § 17a-145-152 (effective February 20, 1997).

---

[11] Child welfare proceedings in Connecticut usually proceed in two stages. In cases involving imminent physical danger to the children an emergency ex-parte OTC is obtained by the Juvenile Court, Conn. Gen. Stat. § 46b-129(b); Conn. Gen. Stat. § 17a-101g(c). By statute a hearing on the OTC must be convened within 10 days of the ex-parte order. Id. An order of temporary

the DCF regulations refer to individuals who have had children removed from their care and custody. See note 10.

Individuals who have had a child removed under an OTC under Conn. Gen. Stat. § 17a-101g(c) and Conn. Gen. Stat. § 46b-129(b) are not eligible to be foster parents if that OTC is upheld after evidentiary hearing. See note 10. The OTC in this case was sustained by order of the trial court on July 15, 1994.

Petitioners claim that for DCF regulations to prohibit parents whose children have been removed by confirmed OTCs from being foster parents is a violation of federal due process rights. The Petitioners fail to cite any case in support of this proposition. It is clear that the Petitioners had an evidentiary hearing before the OTC was confirmed so due process protections were in place before the regulations applied.

custody transfers custody only, not guardianship. Alongside the order of temporary custody a neglect petition is filed, seeking an adjudication of the child as neglected. Conn. Gen. Stat. § 46b-129(a). Conn. Gen. Stat. § 46b-120 states "a child or youth may be found "neglected" who (A) has been abandoned or (B) is being denied proper care and attention, physically, educationally, emotionally or morally or (C) is being permitted to live under conditions, circumstances or associations injurious to his well-being; or (D) has been abused... ." Once the juvenile court enters an adjudication of neglect, the court then enters dispositional orders, committing the child to DCF for up to twelve months, returning the child home under court monitored protective supervision or transferring custody and guardianship to an appropriate third party. A dispositional order of commitment passes both custody and guardianship of the child. Conn. Gen. Stat. § 46b-129(d).

II. THE SIXTH AMENDMENT RIGHT TO COUNSEL DOES NOT APPLY TO PROCEEDINGS UNDER NEGLECT PETITIONS WHICH ARE CIVIL IN NATURE. THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS NOT PRESERVED FOR APPEAL

As argued above, the second issue raised in this Petition for Writ of Certiorari, whether the parents were denied effective assistance of counsel, is not properly reviewable by the United States Supreme Court because it was not addressed by the Connecticut Appellate Court nor raised with the Connecticut Supreme Court. Moreover, the parents lack standing to make this claim, as they never applied for a court appointed attorney and specifically waived their right to counsel. However, even if the second issue raised by the Petitioners were reviewable, the Petition grossly misstates the law concerning right to counsel in child protection cases. The Sixth Amendment right to counsel applies solely to criminal proceedings.[12] However the Connecticut Supreme Court has spoken concerning the right to counsel in the more grievous termination of parental rights proceedings, which result in the permanent elimination of the biological parents' rights to the child. "Neither the Sixth Amendment to the United States Constitution nor Article First, section 8 of the Connecticut Constitution can be extended to a parent in a termination of parental rights hearing to provide a right to effective assistance of counsel." State v. Anonymous, 179 Conn. 155, 159, 425

---

[12] "In all criminal prosecutions, the accused shall enjoy the right ...to have the assistance of counsel for his defense." Conn. Gen. Stat. § 46b-121 places juvenile neglect matters within the civil session of the Connecticut Superior Court.

A.2d 939 (1979). See also State v. Goffe, 41 Conn. App. 454, 474, 676 A.2d 1377, 1386 (1996).[13]

Furthermore, the United States Supreme Court has held that due process does not automatically require the appointment of counsel for indigent parties even in a termination of parental rights action. If counsel is needed that determination is left "to be answered in the first instance by the trial court." Lassiter v. Department of Social Services, 452 U.S. 18, 27, 101 S. Ct. 2153, 2162 (1981). Where the loss of personal freedom is not at stake, there is a presumption against automatic court appointed counsel. Id. In the instant case, the trial court appropriately weighed the

---

[13] In certain situations involving "quasi-criminal" proceedings the Connecticut Supreme Court has held that state and federal constitutional due process requires court appointed counsel. Lavertue v. Niman, 196 Conn. 403, 493 A.2d 213 (1985). Neglect proceedings are not "quasi-criminal" proceedings. See In Re Bobby Jo S., 10 Conn. App. 36, 40, 521 A.2d 219 (1987); In Re Felicia S. and Janelle D., 1993 WL 576430 (Conn. Super.). In Lavertue, which involved a paternity action, there was the risk of contempt and imprisonment for failure to comply with support enforcement orders. By contrast, in neglect proceedings the sole focus is on the condition of the child to determine whether the child meets the definition of neglected under Conn. Gen. Stat. § 46b-120. The adjudication of neglect is entered as to the child, not as to the parents. There is no specific finding of culpability as to the parents and there is no risk of imprisonment of the parents from any orders entered in the neglect proceedings. The sole risk is that the parents will lose on a temporary basis, guardianship rights to their child. Although there are provisions for the state to proceed against a parent for reimbursement of money spent on a child while in the custody of the state, Conn. Gen. Stat. § 17a-10, 17b-745, these provisions do not raise the risk of contempt or imprisonment. Also, unlike the paternity action, these provisions do not create a support obligation but merely implement the existing obligation of the biological parent to support their child.

various interests and risk of error and made a decision consistent with due process.[14]

Even in criminal cases involving the Sixth Amendment right to counsel, there is the countervailing right of an individual to represent oneself. Connecticut has refused to recognize inadequate pro se performance as a valid reason to grant a mistrial in as serious a matter as a criminal murder trial. State v. Day., 233 Conn. 813, 830, 661 A.2d 539 (1995). The United States Supreme Court found a deprivation of a constitutional right to conduct one's own defense when the defendant was forced to accept court-appointed counsel in a criminal matter, and held that a defendant need not have "technical legal knowledge as such...to perform an assessment of [the pro se party's] knowing exercise of the right to defend self." Faretta v. California , 422 U.S. 806, 836 (1975). The Petitioners knowingly and intelligently and in an informed manner waived their right to counsel.[15] See notes 3, 4 and 5 supra.

---

[14] Lassiter requires that the three factors in Matthews v. Eldrige, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1986), be weighed in determining whether due process requires appointment of counsel in a civil termination of parental rights case: (1) the private interests at stake, (2) the government's interest, and (3) the risk that the procedure will lead to an erroneous decision. Here, because the case did not involve a termination of parental rights, the private interests of the Petitioners are not nearly as high as in Lassiter. On the other hand, the interests of the government and the children in bringing the trial to a conclusion and in not inviting a mistrial by allowing new counsel to appear in the midst of trial were compelling.

---

[15] The Respondent contends that the Matthews v. Eldridge due process balancing test, discussed supra, rather than the Faretta standard for criminal proceedings is the test that should be applied. However, even if the Faretta test were applied the canvass of the trial court, particularly the last canvass on 3/14/95, met the Faretta criteria, see note 5, supra. The trial court made a thorough inquiry

The Petitioners failed to preserve the issue of ineffective assistance of counsel for appellate review. As argued above, the Petitioners had no constitutional right to counsel and raised no claim of any constitutional right[16] to counsel in the proceedings below, in fact they vociferously argued for

and was satisfied that the Petitioners: (1) were clearly advised of their right to assistance of counsel, including their right to assignment of counsel; (2) possessed the intelligence and capacity to appreciate the consequences of the decision to represent themselves; (3) comprehended the nature of the proceedings and any additional facts essential to the broad understanding of the case; and (4) were made aware of the dangers and disadvantages of self-representation. Faretta, supra; State v. Day, supra at 813; State v. Townsend, 211 Conn. 215, 222, 558 A.2d 669(1989); State v. Gethers, 197 Conn. 369, 379, 497 A.2d 408 (1985).

---

[16] Review of the record does not support that a constitutional violation clearly exists and clearly deprived the Petitioners the right to a fair trial, in fact the record supports that the Petitioners waived their right to counsel. Finally the Petitioners are educated, intelligent and understood the nature of the proceedings and the facts and issues at trial. Their own trial counsel stated they were able to conduct their defense. See notes 3, 4 and 5. The Petitioners had the benefit of counsel for the entire presentation of the State's case. The Petitioners presented witnesses, filed motions, and a trial brief and conducted a full defense. The Petitioners' allege no errors that they made in representing themselves that materially affected the outcome of trial. The Petitioners' similarly failed to establish a statutory right to counsel in this case. Conn. Gen. Stat. § 46b-135 is a statute for the indigent, for those "unable to afford counsel"; § 46b-136 allows the trial court in its discretion to appoint counsel if the "interest of justice" so requires. Mandated appointment under Conn. Gen. Stat. § 46b-135 specifically requires a finding of financial eligibility. Connecticut Practice Book § 1048.1 (now Practice Book § 34-1(1998 rev.)) states essentially the same entitlements as are expressed in the two statutes. Because the Petitioners never requested appointment of counsel, the trial court was not called upon to make any finding of financial eligibility, and the record does not support the need for the court to have appointed such counsel in the "interest of justice."

the right to represent themselves. Generally the Connecticut law does not excuse the failure of counsel to raise an issue at the trial level. Aksomitas v. Aksomitas, 205 Conn. 93, 97; 529 A.2d 1314 (1987). Connecticut Practice Book § 4061 (now 60-5(1998 rev.)).

III. THE EVIDENCE DID NOT ESTABLISH ANY NEXUS BETWEEN A REQUIRED RELIGIOUS PRACTICE AND THE ALLEGATIONS OF NEGLECT AND ABUSE

The First Amendment issues, as discussed earlier, are not properly reviewable under this Petition for Writ of Certiorari, because they were not reviewed by the Connecticut Appellate Court, nor presented to the Connecticut Supreme Court. However, even if the First Amendment issues were properly reviewable under this Petition, the record does not establish that there was any nexus between required religious practices and the adjudication of the young adults as neglected and abused. The free exercise clause does not apply in each and every situation in which a citizen subjectively claims that the regulation of a behavior impacts on alleged religious practice. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). The trial court must determine whether the regulated behavior and the religious faith of the citizen challenging the regulations are "inseparable and interdependent." Id.; Mason v. Gen. Brown Cent. School District, 851 F.2d 47, 51 (2d. Cir. 1988).

Simply put, religion was not one of the factors that led to the children being removed from the Petitioners' home and the trial court so found.[17] The Petitioners own expert on the

---

[17] Nearly all of the references to the Jewish religion in the trial proceedings were raised on cross examination or redirect by the

Jewish Family, Dr. Norman Linzer, failed to establish any nexus between the behavior that resulted in the children's removal and required tenets and practices of the Jewish faith. Tr. 3/28/95 at 62-66. The trial court specifically found that the incidents of neglect and abuse on which the court relied for adjudication were not sanctioned by, or required tenets of the Jewish Faith.

> "Respondents [Parents] offered considerable evidence and testimony to further their argument, that most, if not all, of the conduct they engaged in and conditions which existed in their home, are sanctioned, if not required by the tenets of their religion.... Testimony offered by the respondents [Parents] did not seem to corroborate their beliefs. Dr. Norman Linzer, who testified as an expert on the Jewish Family, stated that many of the parenting practices which the court finds engaged in by the [respondent] parents, such as expulsion from the home to outdoors, refusal to speak or be spoken to, written performance contracts and written admissions of failure and disobedience, and the withholding of forgiveness for extended periods of time, are in fact, not acceptable parenting techniques according to Jewish law and Scripture." 9/28/95 Mem. of Dec. at 5-6.

Petitioners themselves. The Petitioners' counsel continually sought to raise the issue of religion, although not one scintilla of evidence was presented confirming that any of the discipline practices of which the children complained were in fact religious practices or required tenets of the Jewish Faith. (See notes 13, 14 and 15 in Petitioners Petition for Writ of Certiorari).

Finally, even if the Petitioners had established that the regulated behaviors were prescribed by their faith, which they cannot, there is a compelling state interest in the health, safety and welfare of children. Prince v. Massachusetts, 321 U.S. 158 (1944). When balancing the interests of the parents in discipline techniques that are tenuously related to their religious beliefs against the interest of the state as parens patriae faced with children at risk of serious psychological damage and/or exposure to the streets, if returned home, state intervention was warranted. 9/28/95 Mem. of Dec. at 11.

IV. THE PETITION FOR WRIT OF CERTIORARI DOES NOT MEET THE CRITERIA SET FORTH IN RULE 10

As stated in Rule 10, review on a writ of certiorari is not a matter of right, but of judicial discretion. The Petitioners state no compelling reason for the Court to grant the writ of certiorari. This is not a case in which there is a conflict between decisions of different United States courts of appeals on the same important matter; nor is there a conflict between the decision of a federal court of appeals and a state court of last resort; nor is it a case requiring this Court to exercise its supervisory powers over the federal courts of appeal. Rule 10(a). Further, the Petitioners do not allege that this is a case in which a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. Rule 10(b). In fact the Connecticut Supreme Court decided nothing at all, except not to review the Connecticut Appellate Court decision that the appeal was moot. The Petitioners do not assert that this is a case in which a state court or a United States Court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has

decided an important federal question in a way that conflicts with relevant decisions of this Court. The issue of mootness as applied by a Connecticut Appellate Court to its own jurisdiction is not a matter of federal law.

CONCLUSION

The Petition for Writ Certiorari should be denied.

Respectfully submitted,

RESPONDENT
DEPARTMENT OF CHILDREN AND FAMILIES

RICHARD BLUMENTHAL
ATTORNEY GENERAL

*SUSAN T. PEARLMAN
Assistant Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Tel. No. (860)-808-5480
No.06338

*Counsel of Record

No. 97-1573

In The

Supreme Court Of The United States

October Term, 1997

IN RE: ELISABETH H.

IN RE: CATHERINE H.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

APPENDIX

APPENDIX TABLE OF CONTENTS

Appendix A -

In re Catherine and Elisabeth H., Superior Court Memorandum of Decision, November 7, 1995 A-1

Appendix B -

Conn. Gen. Stat. § 1-1d B-1
Conn. Gen. Stat. § 17a-101g B-2

NOS. N-93141 AND N-93142

SUPERIOR COURT-
JUVENILE MATTERS

IN RE CATHERINE AND ELISABETH H.

JUDICIAL DISTRICT OF
DANBURY AT DANBURY

NOVEMBER 7, 1995

MEMORANDUM OF DECISION
DISPOSITION PHASE

On September 28, 1995, this court filed its Memorandum of Decision regarding the petition filed by the Commissioner of Children and Families which alleged that the above-named youths were neglected, abused and uncared for by their parents, Edward and Rochelle H.

In that Memorandum of Decision, the court adjudicated that the petitioner had established each of those allegations by a fair preponderance of the evidence at a lengthy and extensive trial.

Having bifurcated the proceedings into the adjudicatory and dispositional phases, the court then proceeded to conduct an evidentiary hearing to determine the appropriate disposition in view of the foregoing adjudication.

The dispositional phase hearing was conducted on October 18, 1995, after notice to all parties.

On the date of said hearing, the respondent parents, as parties pro se, filed with the court a pleading captioned "Dispositional Statement," which commenced with the words: "I would like to make a statement that we will not oppose the disposition for two reasons." After enunciating those

"reasons," the respondent parents conducted said statement as follows: "The only recourse left to us is our right to appeal this wrongful decision of abuse/neglect and turn our efforts to introduce [sic] some accountability to a system that badly needs it." It was subscribed and sworn to by the respondent mother and the respondent father. (Children's Ex. I.)

Neither of the respondent parents appeared for the dispositional hearing, nor did the attorney who remains their co-counsel and attorney of record, despite his absence from the courtroom on many of the final trial dates.

The court considered the respondent parents' "Dispositional Statement" to be their indication to the court that they had knowingly and voluntarily elected not to attend the dispositional hearing, and the court proceeded in their absence.

The attorney for Barbara and Moshe C., the Movants for Intervention, renewed their Motion to Intervene, dated November 17,1993. The court, noting that said motion had been marked off on a prior occasion with the movants' right to renew it at the time of disposition having been reserved to them by the court, granted the Motion to Intervene. No objection was made by the appearing parties.

Adjudication of the petitions have previously entered, the court has four common dispositional alternatives to consider. They are (1) commit the two youths to the Department of Children and Families; (2) order the youths returned to the home with the parents under the court's supervision (protective supervision); (3) vest custody of the youths in a third party; or, (4) dismissed the complaint if the parents have rectified the offensive situation.

The dispositional phase, unlike the adjudicatory phase, permits evidence to be offered or considered by the court regarding events right up to the final date of trial. The standard to be applied is the best interests of the child or youth.

The evidence in the instant case does not permit the court to make a finding that the parents have rectified the home situation which the court found to be the basis for the adjudication of neglect, abuse and uncared for as alleged in the petition.

The evidence does not permit the court to make a finding that the best interests of the youths would be served by returning them to the care and custody of the respondent parents under the protective supervision of the court.

There was no evidence that there is an appropriate third party who is ready, willing and able to be appointed as the guardian of Catherine and Elisabeth.

The court bases its findings upon, inter alia:

a. the DCF Social Study regarding Catherine and Elisabeth filed by DCF Social Worker, Linda Maxwell, on December 13, 1993 (State's Ex. 5);

b. the psychological evaluation - addendum of Bruce Freedman, Ph.D., filed on December 7, 1993 (State's Ex. 1);

c. the psychological evaluation of Bruce Freedman, Ph.D., filed on September 25, 1995 (State's Ex. 2);

d. memo of Lillie Davis, Guidance Counselor, The High School, Brookline, Mass., to Kelly McCarthy, [Mass.] D.S.S., dated October 16, 1995 (State's Ex. 3); and

e. letter of Kelly McCarthy, Social Worker, [Mass.] D.S.S., dated October 17, 1995 (State's Ex. 4).

The court finds that in view of all relevant factors including the age, intelligence, maturity, demeanor, preference and overall needs of both Catherine and Elisabeth, that it is in the best interests that they each be committed to the Commissioner of Children and Families for a period not to exceed twelve months, pursuant to Sec. 46b-129(d) of the Connecticut General Statutes.

Noting the progress each of these youths has reportedly made since their relative placement in the home of their sister, Barbara and her husband Moshe in Brookline, Massachusetts, it is recommended that their placement by the Commissioner continue to be in that home.

Noting the youths' preference to limit contact between themselves and their parents, the court makes no orders at this time concerning visitation between parents and children, but rather defers to the Commissioner to determine that issue.

_____

Joseph W. Doherty, Judge

Sec. 1-1d. "Minor", "infant", "infancy", "age of majority", defined.

Except as otherwise provided by statute, on and after October 1, 1972, the terms "minor", "infant" and "infancy" shall be deemed to refer to a person under the age of eighteen years and any person eighteen years of age or over shall be an adult for all purposes whatsoever and have the same legal capacity, rights, powers, privileges, duties, liabilities and responsibilities as persons heretofore had at twenty-one years of age, and "age of majority" shall be deemed to be eighteen years.

(1972, P.A. 127, S. 1.)

Sec. 17a-101g. Classification and evaluation of reports. Investigation. Home visit. Removal of child in imminent risk of harm.

(a) Upon receiving a report of child abuse as provided in section 17a-101b, the Commissioner of Children and Families, or his designee, shall cause the report to be classified and evaluated immediately. If the report contains sufficient information to warrant an investigation, the commissioner shall make his best efforts to commence an investigation of a report concerning an imminent risk of physical harm to a child or other emergency within two hours of receipt of the report and commence all other reports within seventy-two hours of receipt of the report. The department shall complete any such investigation within thirty calendar days of receipt of the report.

(b) The investigation shall include a home visit at which the child and any siblings are observed, if appropriate, a determination of the nature, extent and cause or causes of the reported abuse or neglect, a determination of the person or persons suspected to be responsible for such abuse or neglect, the name, age and condition of other children residing in the same household and an evaluation of the parents and the home. The report of such investigation shall be in writing. The investigation shall also include, but not be limited to, a review of criminal conviction information concerning the person or persons alleged to be responsible for such abuse or neglect and previous allegations of abuse or neglect relating to the child or other children residing in the household or relating to family violence.

(c) If the Commissioner of Children and Families, or his designee, has probable cause to believe that the child or any other child in the household is in imminent risk of physical harm from his surroundings and that immediate removal

from such surroundings is necessary to ensure the child's safety, the commissioner, or his designee, shall authorize any employee of the department or any law enforcement officer to remove the child and any other child similarly situated from such surroundings without the consent of the child's parent or guardian. The commissioner shall record in writing the reasons for such removal and include such record with the report of the investigation conducted under subsection (b) of this section.

(d) The removal of a child pursuant to subsection (c) of this section shall not exceed ninety-six hours. During this period of such removal, the commissioner, or his designee, shall provide the child with all necessary care, including medical care, which may include an examination by a physician or mental health professional with or without the consent of the child's parents, guardian or other person responsible for the child's care, provided reasonable attempts have been made to obtain consent of the child's parents or guardian or other person responsible for the care of such child. During the course of a medical examination, a physician may perform diagnostic tests and procedures necessary for the detection of child abuse or neglect. If the child is not returned home within such ninety-six hour period, with or without protective services, the department shall proceed in accordance with section 46b-129.

(P.A.96-246, S.9.)